Office Supreme Court, U.S.
FILED
JUN 4 1964
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1963

151

No. [redacted]

ALVIN CHANCE,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

J. EDWARD WORTON
548 Pan American Bank Building
Miami 32, Florida

JOSEPH P. MANNERS
Industrial National Bank Building
Miami 32, Florida

W. G. WARD
1240 duPont Building
Miami, Florida

CHESTER BEDELL
1520 Barnett National Bank Building
Jacksonville, Florida

Attorneys for Petitioner.

INDEX.

	PAGE
CITATIONS TO OPINIONS BELOW	2
JURISDICTION	2
QUESTIONS PRESENTED	2
STATUTES INVOLVED	3
STATEMENT	4
REASONS FOR GRANTING WRIT	
I. The Court of Appeals has decided an important federal question in a way that conflicts with the decisions of this Court in *Ballard* v. *United States*, 329 U. S. 187, 67 S. Ct. 261, 91 L. Ed. 181, and *Cassell* v. *Texas* (1950), 339 U. S. 282, 70 S. Ct. 629, 94 L. Ed. 839	9
II. The Court of Appeals has decided an important federal question in a way that conflicts with the decision of this Court in *Glasser* v. *United States*, 315 U. S. 60, 62 S. Ct. 457, 86 L. Ed. 680, with the decision of the Court of Appeals for the Second Circuit in *United States* v. *Flynn* (2d Cir., 1954), 216 F. 2d 354, *cert. den.* 348 U. S. 909, and with the decision of the Court of Appeals for the Seventh Circuit in *United States* v. *Henderson* (7th Cir., 1962), 298 F. 2d 522, *cert. den.* 369 U. S. 878	13
III. The Court of Appeals has so far departed from the accepted and usual course of judicial proceedings and has so far sanctioned such a departure by the District Court as to call for an exercise of this Court's power of supervision	16
CONCLUSION	19

TABLE OF AUTHORITIES

Cases.

	PAGE
Ballard v. *United States* (1946), 329 U. S. 187, 67 S. Ct. 261, 91 L. Ed. 181	9, 10, 11, 16
Beatrice Foods Co. v. *United States* (8th Cir., 1963), 312 F. 2d 29	15
Cassell v. *Texas* (1950), 339 U. S. 282, 70 S. Ct. 629, 94 L. Ed. 839	9, 12
Glasser v. *United States* (1942), 315 U. S. 60, 62 S. Ct. 457, 86 L. Ed. 680	13, 14, 15
Hoyt v. *Florida* (1961), 368 U. S. 57, 82 S. Ct. 159, 7 L. Ed. 2d 118	9
Murchison, In Re (1955), 349 U. S. 133, 75 S. Ct. 623, 99 L. Ed. 942	18
Quercia v. *United States* (1933), 289 U. S. 466, 53 S. Ct. 698 77 L. Ed. 1321	18
United States v. *Brandt* (N. D. Ohio, 1955), 139 F. Supp. 362	15
United States v. *Flynn* (2d Cir., 1954), 216 F. 2d 354, cert. den. 348 U. S. 909	13
United States v. *Fujimoto* (D. Hawaii, 1952), 102 F. Supp. 890	15
United States v. *Greenberg* (S. D. N. Y., 1961), 200 F. Supp. 382	15
United States v. *Henderson* (7th Cir., 1962), 298 F. 2d 522, cert. den. 369 U. S. 878	13, 15
United States v. *Hoffa* (S. D. Fla., 1961), 196 F. Supp. 25	5, 7, 16
United States v. *Meyer, et al.* (R. 542)	7
United States v. *Romano* (D. Conn., 1961), 191 F. Supp. 772	15
United States v. *Silverman* (D. Conn., 1955), 129 F. Supp. 496	14

PAGE

United States v. *Standard Oil Company* (N. D. Ind., 1958), 165 F. Supp. 359 15

United States v. *Wiman* (5th Cir., 1962), 304 F. 2d 53 12

Wilson v. *United States* (5th Cir., 1939), 104 F. 2d 81, cert. den. 308 U. S. 574 15

STATUTES.

Title 28 U. S. C., Sec. 1861 ..... 2, 3, 4, 13

Sec. 1864 ..... 2, 3, 13, 14

Florida Statutes 1959, Sec. 40.01 4

Sec. 97.041 4

IN THE

Supreme Court of the United States

OCTOBER TERM, 1963

No. .....

ALVIN CHANCE,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

TO THE HONORABLE, THE CHIEF JUSTICE OF THE UNITED STATES AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Alvin Chance, petitioner, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit, entered in this cause on August 27, 1963.

Citations to Opinions Below.

The opinions delivered in the Court of Appeals for the Fifth Circuit by District Judge Whitehurst with Judge Cameron concurring and by Judge Brown, dissenting, are officially reported at 322 F. 2d 209, 208, and are printed with the court's judgment in Appendix A hereto. The court's opinion upon petition for rehearing, which is not yet officially reported, is printed with the court's order denying petition for rehearing in Appendix B.

Jurisdiction.

1. The judgment of the Court of Appeals sought to be reviewed was dated and entered August 27, 1963.

2. Appellants' timely petition for rehearing was denied by the Court of Appeals by order dated May 5, 1964. No extension of time to petition for certiorari has been requested or granted.

3. The statutory provision believed to confer jurisdiction on this court to review the judgment in question by writ of certiorari is 28 U. S. C., Section 1254(1).

Questions Presented.

1. Are district court jury officials affirmatively required by Title 28 U. S. C., Section 1861, as amended by the Civil Rights Act of 1957 (71 Stat. 638), to select citizens for federal jury service without regard to their qualifications to serve as jurors in the courts of the State wherein the district lies?

2. Are district court jury officials affirmatively required by Title 28 U. S. C., Section 1864, to determine, before

placing the names of prospective jurors in the jury box, that such persons possess the minimum qualifications prescribed for federal jurors by Title 28 U. S. C., Section 1861?

Statutes Involved.

1. Title 28 U. S. C., Section 1861, as amended September 9, 1957, 71 Stat. 638:

> "Any citizen of the United States who has attained the age of twenty-one years and who has resided for a period of one year within the judicial district, is competent to serve as a grand or petit juror unless——
>
> (1) He has been convicted in a State or Federal court of record of a crime punishable by imprisonment for more than one year and his civil rights have not been restored by pardon or amnesty.
>
> (2) He is unable to read, write, speak, and understand the English language.
>
> (3) He is incapable, by reason of mental or physical infirmities to render efficient jury service."

2. Title 28 U. S. C., Section 1864, 62 Stat. 952:

> "The names of grand and petit jurors shall be publicly drawn from a box containing the names of not less than three hundred qualified persons at the time of each drawing.
>
> "The jury box shall from time to time be refilled by the clerk of court, or his deputy, and a jury commissioner, appointed by the court.
>
> "Such jury commissioner shall be a citizen of good standing, residing in the district and a well known member of the principal political party in the district, opposing that to which the clerk, or his deputy then acting, may belong. He shall receive $5 per day for each day necessarily employed in the performance of his duties.
>
> "The jury commissioner and the clerk, or his deputy, shall alternately place one name in the jury box without reference to party affiliations, until the

box shall contain at least 300 names or such larger number as the court determines.

"This section shall not apply to the District of Columbia."

3. Section 40.01, Florida Statutes 1959, the pertinent text of which is set forth in Appendix C.

4. Section 97.041, Florida Statutes 1959, the pertinent text of which is set forth in Appendix C.

Statement.

On September 9, 1957 the Civil Rights Act became effective to amend Section 1861 of Title 28, United States Code, prescribing qualifications of federal jurors. Congress thereby eliminated former subsection (4) of Section 1861, which had provided that no person should be competent as a federal juror if

> "He is incompetent to serve as a grand or petit juror by the law of the State in which the district court is held."
>
> 62 Stat. 951.

The jury box for the Miami Division of the District Court for the Southern District of Florida was not thereafter refilled until July 1959 (R. 236, 260, 263). At that time, in gathering five thousand names to fill the box pursuant to oral directions from District Judge Choate (R. 245), the jury officials systematically excluded from consideration as prospective jurors those United States citizens who were ineligible under Florida law for jury service in the State courts, just as they had done when last they filled the box.

Because Florida law made eligible for State jury service only those men who were "duly qualified electors of their respective counties" and only those female electors who had "registered with the clerk of the circuit court [their] desire to be placed on the jury list" (Section 40.01(1),

F. S. 1959; Appendix C), the jury officials for the district court gathered the names of men only from lists of electors kept by the county supervisors of registration and obtained from the clerks of the circuit courts the names of women who had volunteered for State jury service (R. 236-40). The names of a small number of Negro men were provided by "ministers and different organizations" in the Negro community (R. 240). Those names were placed in the jury box and no others were considered (R. 267-68). Even those women who had volunteered to the officials for federal jury service were sent away with the admonition that they could not qualify for federal jury service until they first volunteered for State jury duty at the office of the clerk of the circuit court (R. 239, 261). Not until November 1959 did the jury officials become informed, as a result of a visit by a representative of the Administrative Office of United States Courts, that women should not be excluded "simply because they had not registered for [State] jury duty" (R. 261). District Judge Lieb stated, upon discovering a similar situation prevailing in the Orlando Division,

> "Apparently the jury commissioner and the deputy clerk were either unaware of the change of the law or forgot about it, for they deliberately and exclusively limited their selection of names for the jury box to those persons who were then registered to vote and, in the case of women, to those who had also volunteered for jury service in the State Court."
>
> *United States* v. *Hoffa* (S. D. Fla., 1961), 196 F. Supp. 25, 29.

Having gathered a number of names for inclusion in the jury box, the jury officials did not undertake to determine whether those persons possessed the qualifications prescribed by Section 1861 for federal jurors. The jury officials did not consider it was their duty to make such a determination. After the visit of the Administrative office representative in November and before December 9, 1959, when one thousand additional names were placed in the jury box (R. 242, 265-70), between forty and sixty men and women volun-

teered for federal jury service and their names were accepted for inclusion in the box (R. 266). Even as to those volunteers, no inquiry of substance was made to determine their qualifications to serve as jurors. Deputy Clerk Oswald testified that those persons were asked only three questions (R. 289): whether they were citizens of the United States (which is a qualification under Section 1861); whether they were residents of the State for one year (which is not); and whether they were residents of the county for six months (which is not). Mr. Oswald further testified:

"Q. [By Mr. Bedell:] And you don't exercise any discretion as to whether one person or another is qualified? You just put them all in, is that it?

"Mr. Boardman [U. S. Attorney for the Southern District of Florida]:

"Well, may it please the Court:

"I think that the testimony was that is after the three questions were asked.

"The Witness [Mr. Oswald]: Yes, sir.

"Mr. Boardman: So it wasn't just indiscriminate.

"The Court: Well, I think he has the right to develop the facts.

"The Witness: As Mr. Boardman says, those are the three questions that we propounded to the gentlemen, or women, that come in, *and that's all we can ask them when they come into register.*

"By Mr. Bedell:

"Q. You don't make any determination as to whether they can read, write, speak or understand the English language? A. No, sir.

"Q. You don't make any effort to determine their mental and physical condition? A. No, sir, not at that time.

"Q. You don't even ask them what their occupation is? A. No, sir.

* * * * * * *

"The Court: Or whether they have been convicted of a crime or not?

"The Witness: No, sir, not at that time.

"The Court: Or their civil rights restored by pardon or amnesty?

"The Witness: No. *That's taken care of when they are qualified on voir dire.*" R. 293-94 (Emphasis added.)

On August 11, 1960, Judge Choate ordered that the names of fifty persons be drawn from the box to serve as Grand Jurors beginning September 6, 1960 (R. 520). From that panel of fifty was formed the Grand Jury that became known as the "McKee Grand Jury" because its foreman was J. Charles McKee, Jr. (R. 9).

On January 13, 1961 the McKee Grand Jury returned an indictment in the case of *United States v. Meyer, et al.* (R. 542). At that time an indictment returned by an Orlando Division Grand Jury was under attack "upon the ground that the grand jury was improperly selected." *United States v. Hoffa* (S. D. Fla., 1961), 196 F. Supp. 25, 26. On March 22, 1961, the *Meyer* defendants similarly attacked the indictment returned against them by the McKee Grand Jury (R. 42-43).

On May 25, 1961 Judge Bryan Simpson of the Southern District of Florida, who one week previously succeeded Judge George W. Whitehurst as Chief Judge (191 F. Supp. xi), received evidence in the *Meyer* case on the issue of whether the jury officials failed to comply with the statutory requirements in filling the box from which the McKee Grand Jury was drawn. He reserved ruling on the *Meyer* motions.

On July 12, 1961 Judge Lieb dismissed the Orlando indictment in the *Hoffa* case because "the grand jury was drawn from a panel which was selected contrary to the requirements of law." 196 F. Supp. at 31. No appeal was taken by the United States from that ruling.

While Judge Simpson continued to reserve ruling on the *Meyer* motions, the McKee Grand Jury continued to return indictments. On August 2, 1961, the Grand Jury indicted petitioner Alvin Chance on charges of conspiracy and violation of the liquor laws (R. 5-9). Finally, on December 16, 1961, Chief Judge Simpson denied the *Meyer* motions attacking the Grand Jury (R. 544-45).

On March 5, 1962, petitioner Chance was permitted to file a motion to dismiss the indictment on the ground that "the Grand Jury was not selected, drawn or summoned in accordance with law" (R. 10). By agreement (R. 12), the *Meyer* record (R. 208 et seq.) was considered in connection with Chance's motion, which was denied (R. 12). Chance, convicted on March 23, 1962 (R. 16), appealed (R. 18) to the Court of Appeals for the Fifth Circuit.

District Judge Whitehurst, who had been Chief Judge of the Southern District from May 1, 1959 until May 18, 1961 (169 F. Supp. xi, 191 F. Supp. xi), was designated to sit with Circuit Judges Brown and Cameron on the panel that considered Chance's appeal. In accordance with the Fifth Circuit practice, the names of the panel members were not announced before oral argument on April 8, 1963 (R. 564). Petitioner made no objection on that occasion to Judge Whitehurst's participation.

On August 27, 1963, with Judge Brown dissenting (322 F. 2d 201, 208; Appendix A), the judgment of the district court was affirmed (R. 579). District Judge Whitehurst delivered an opinion in which Judge Cameron concurred, and held:

> "The statutes provide no affirmative requirements of the officials in gathering names for the jury box. . . . [T]he law as it now stands places the officials under no mandatory or positive commands; they are, on the contrary, controlled by one negative requirement: they may not discriminate, directly or indirectly."
>
> 322 F. 2d at 205.

In dissent, Judge Brown stated:

> "I think the practice of including (a) only those males who have registered to vote and (b) only the females who have *volunteered* for jury service does not meet the requirements, 28 U. S. C. A. § 1861, of a constitutionally empaneled Grand Jury. I therefore align myself with Judge Lieb's opinion in United States *v.* Hoffa, S. D. Fla., 1961, 196 F. Supp. 25,

and respectfully dissent from the present opinion of this Court."

322 F. 2d at 208.

On October 16, 1963 appellant filed a timely (R. 581) petition for rehearing (R. 582-89), a motion for rehearing en banc (R. 590-97), and a supporting brief (R. 599-619). On May 5, 1964, the court denied (R. 665) the petition for rehearing and filed a per curiam opinion (R. 659-63). No separate order was entered on appellant's motion for rehearing en banc.

Reasons for Granting the Writ.

I.

The Court of Appeals has decided an important federal question in a way that conflicts with the decisions of this Court in *Ballard* v. *United States*, 329 U. S. 187, 67 S. Ct. 261, 91 L. Ed. 181, and *Cassell* v. *Texas* (1950), 339 U. S. 282, 70 S. Ct. 629, 94 L. Ed. 839.

The chief effect of the Civil Rights Act of 1957 (71 Stat. 638) on juror selection standards in the Southern District of Florida was (or should have been) "to make women eligible for federal jury service even though ineligible under state law." *Hoyt* v. *Florida* (1961), 368 U. S. 57, 60, 82 S. Ct. 159, 162, 7 L. Ed. 2d 118, footnote 2. Yet this plain fact was unknown by the jury officials of that district. Since in ignorance they could not and did not identify the body of qualified prospective jurors in the community, they were unable to make an informed decision as to an appropriate means for gathering names from that group.

The jury officials did not consult the State voter registration lists simply because those lists afforded a convenient list of prospective jurors in the community. The

names of men only were taken from those lists (Tr. ~~27~~ 236). Neither did the jury officials determine that, because of her important role in the home, a woman should not be called for jury duty unless she should first express her desire to be called. It was not the act of volunteering but the act of volunteering to the clerk of the State circuit court that made women acceptable to the federal jury officials (Tr. ~~30, 507~~ 239, 261).

The effect of this practice was to exclude from consideration all males who were not electors and all females who were not both electors and registered volunteers for State jury duty. Such an exclusion would itself seem to require vindication of this Court's decision in *Ballard* v. *United States*, in which the Court decided that

> "the purposeful and systematic exclusion of women from the panel in this case was a departure from the scheme of jury selection which Congress adopted. . . ."
>
> 329 U. S. at 193, 67 S. Ct. at 264.

Yet, in the Southern District of Florida the jury officials did not deliberately exclude women from jury service out of hostility toward women jurors. A number of women who had volunteered for State court jury duty were in fact summoned (Tr. 522-23) and three such women served on the McKee Grand Jury (Tr. 516). Neither is there evidence that the jury officials felt that nonvoting males would not make good jurors and determined to exclude nonregistered men on that account. The jury officials acted, not out of an intention to discriminate against the classes excluded, but out of a misconception that those classes were ineligible under the standards prescribed by Congress. The conduct of the jury officials in this case cannot accurately be condemned as though they had with bad motive undertaken to exclude all nonvoters and women; neither can their conduct be justified as the Court of Appeals has attempted to justify it (322 F. 2d 201; Appendix A), by disposing of the case as if the jury officials had consulted the registration lists

and the circuit court lists of female volunteers simply as convenient indices to the larger body of qualified citizens.

In this case the jury system in the Southern District of Florida was deprived, not only "of the broad base it was designed by Congress to have" (*Ballard*, 329 U. S. at 195, 67 S. Ct. at 265), but also of the benefit that Congress sought to secure by providing for local execution and implementation of the bare statutory standards by conscientious and well-informed jury officials. The success of the statutory scheme depends on the intelligent exercise of the discretion vested in the local jury officials. In this case, the complaint is not that the jury officials exercised their discretion badly but that they did not exercise it at all. Having a duty to determine how best to identify and select names from the large body of citizens qualified by federal standards, the jury officials, acting as if it were their job only to perform the mechanical chore prescribed under Florida law, simply gathered the names of those who were listed by State officials as meeting the rather arbitrary and restrictive qualifications for State court jury duty.

In the circumstances of this case, the larger question is whether Congress has imposed on local jury officials a positive, affirmative duty to become acquainted with applicable federal standards, to identify the body of citizens qualifying under those general standards and to exercise their informed judgment in determining how best to select prospective jurors from the group. The court below held that no such duty was imposed.

The decision of the Court of Appeals is incorrect and it conflicts directly with the *Ballard* decision, in which this Court declared that Congress has enacted "prescribed standards of jury selection" and that to disregard those prescribed standards inflicts injury on the jury system:

> "The evil lies in the admitted exclusion of an eligible class or group in the community in disregard of the prescribed standards of jury selection. . . . It is a departure from the statutory scheme. As well stated in United States *v.* Roemig, D. C., 52 F. Supp. 857, 862, '. . . It is an administrative denial

> of a right which the lawmakers have not seen fit to withhold from, but have actually guaranteed to [the defendant]' . . . The injury is not limited to the defendant—there is injury to the jury system, to the law as an institution, to the community at large, and to the democratic ideal reflected in the processes of our courts."
>
> 329 U. S. at 195, 67 S. Ct. at 265.

The decision of the Court of Appeals conflicts also in principle with *Cassell* v. *State of Texas*, in which this Court held that Texas jury officials who were not "personally acquainted" with qualified prospective jurors of the Negro race and who failed to perform "their duty to familiarize themselves fairly with the qualifications of the eligible jurors of the county without regard to race and color" had unlawfully discriminated against Negroes. 339 U. S. 282, 289-290 S. Ct. 629, 633, 94 L. Ed. 839. In so holding, this Court stated that it is not enough that jury officials refrain from deliberately excluding persons and classes whom they know to be qualified; it was their affirmative duty to identify and become familiar with the large body of qualified citizens beyond their acquaintance, and to do so "without regard to race and color." That duty was thereafter properly characterized by the Court of Appeals for the Fifth Circuit as "a positive, affirmative duty on the part of the jury officials and other State officials." *United States* v. *Wiman* (5th Cir., 1962), 304 F. 2d 53, 65.

This Court, which ultimately is responsible in large measure for the kind of criminal justice that is administered by United States officials of United States courts, cannot require less of those officials than is required by the Constitution of those occupying similar positions in the States. It was the "positive, affirmative duty" of the jury officials for the Southern District of Florida "to familiarize themselves fairly with the qualifications of the eligible jurors" in the community without regard to the irrelevant question of who among them were eligible to

serve as jurors in the State courts. In rendering a contrary decision based on the explicit declaration that "the statutes provide no affirmative requirements of the officials in gathering names for the jury box. . . . [and] places the officials under no mandatory or positive commands" (322 F. 2d at 205), the Court of Appeals rendered a decision in conflict with applicable decisions of this Court.

II.

The Court of Appeals has decided an important federal question in a way that conflicts with the decision of this Court in *Glasser* v. *United States*, 315 U. S. 60, 62 S. Ct. 457, 86 L. Ed. 680, with the decision of the Court of Appeals for the Second Circuit in *United States* v. *Flynn* (2d Cir., 1954), 216 F. 2d 354, *cert. den.* 348 U. S. 909, and with the decision of the Court of Appeals for the Seventh Circuit in *United States* v. *Henderson* (7th Cir., 1962), 298 F. 2d 522, *cert. den.* 369 U. S. 878.

Section 1864 of Title 28 requires the jury officials to select and place in the jury box the names of three hundred "qualified persons" or such larger number of "qualified persons" as the court determines. Title 28 U. S. C., Sec. 1861. In *Glasser* v. *United States* this Court affirmed that "this duty of selection may not be delegated" by the jury officials. 315 U. S. at 85, 62 S. Ct. at 472.

In the cases of *United States* v. *Flynn* and *United States* v. *Henderson*, the Courts of Appeals for the Second and Seventh Circuits recognized the obligation imposed on jury officials to exercise their judgment in screening out those prospective jurors who do not meet, as a very minimum, the qualifications prescribed by Congress. In those cases, the courts approved the imposition of other reasonable standards which were indiscriminately applied on a local level by the jury officials.

If Congress contemplated that jury officials *may* exercise their judgment in measuring prospective jurors by standards adopted locally, surely that body intended that those officials *shall* do so in enforcing statutory standards In *Glasser*, this Court spoke of "this *duty* of selection," not of a *privilege* of selection. In this case, the jury officials made no determination of whether the persons whose names were gathered had been convicted of a crime and had not been restored their civil rights [a disqualification under Section 1861(1)], whether they could read, write, speak or understand the English language [as required by Section 1861(2)], or whether they were mentally and physically able to render efficient jury service [as required by subsection (3)] (Tr. 79-80). The deputy clerk testified that "that's taken care of when they are qualified on voir dire" (Tr. 80).

It is evident that the jury officials, having gathered a number of names principally from the State lists of electors and female volunteers for jury service, made no effort to select from that group those who possessed the minimum qualifications prescribed by Congress in Section 1861. In a charade based on Section 1861's requirement that

> "the jury commissioner and the clerk, or his deputy, shall alternately place one name in the jury box."
>
> 28 U. S. C., Sec. 1864.

the two jury officials, without even examining the names individually, alternately seized large handfuls of paper slips bearing names and dropped them in the box (Tr. 56). Thus, the jury officials sought to delegate their responsibility of selection to the district judges. But "this duty of selection may not be delegated" [*Glasser* v. *United States* (1942), 315 U. S. at 85, 62 S. Ct. at 472], not even to the district judges. *United States* v. *Silverman* (D. Conn., 1955), 129 F. Supp. 496.*

* "Did the jury commission fulfill its express statutory duty of placing in the box preparatory to the drawing of September 2, 1953, the names of not less than three hundred qualified persons? This

In response to petitioner's contention that the duty to select qualified jurors is a positive, affirmative and nondelegable duty imposed by Congress on the jury officials, the Court of Appeals held that "the statutes provide no affirmative requirements." 322 F. 2d at 205. This decision conflicts not only with the cited cases and with *Wilson* v. *United States* (5th Cir., 1939), 104 F. 2d 81, *cert. den.*, 308 U. S. 574 [in which the Fifth Circuit itself declared it to be the jury officials' duty "to make inquiry before the names of jurors were placed in the box"] but also with many other cases, including *Beatrice Foods Co.* v. *United States* (8th Cir., 1963), 312 F. 2d 29; *United States* v. *Henderson* (E. D. Wis., 1961), 198 F. Supp. 278, 279, being the district court decision giving rise to the *Henderson* appeal heretofore mentioned; *United States* v. *Brandt* (N. D. Ohio, 1955), 139 F. Supp. 362, 364; *United States* v. *Standard Oil Company* (N. D. Ind., 1958), 165 F. Supp. 359, 361, 363; *United States* v. *Romano* (D. Conn., 1961), 191 F. Supp. 772; *United States* v. *Fujimoto* (D. Hawaii, 1952), 102 F. Supp. 890; *United States* v. *Greenberg* (S. D. N. Y., 1961), 200 F. Supp. 382.

The statutory scheme outlined by this Court in *Ballard* contemplates that the enacted standards be enforced and that they be enforced by the jury officials who otherwise have no reason for existence. They are, indeed, "the officials charged with choosing federal jurors." *Glasser* v. *United States*, 315 U. S. at 86, 62 S. Ct. at 472. In this respect, too, the Court of Appeals for the Fifth Circuit rendered a decision in conflict with applicable decisions of this court and decisions of other Courts of Appeals.

---

question cannot be answered in the affirmative because the jury commission, which alone had power to decide who was qualified, did not know at that time; moreover, it still did not know at the time of the hearing." 129 F. Supp. at 508-09.

III.

The Court of Appeals has so far departed from the accepted and usual course of judicial proceedings and has so far sanctioned such a departure by the District Court as to call for an exercise of this Court's power of supervision.

In the *Ballard* case this Court

> "granted the petition for certiorari because of the serious questions concerning the administration of criminal justice which were raised."
>
> 329 U. S. at 189, 67 S. Ct. at 262.

In this case the "serious questions concerning the administration of criminal justice" relate not only to the conduct of the jury officials in failing to perform the mandatory duties imposed on them by Congress but also to the manner in which the issue regarding jury selection in the Southern District of Florida was disposed of by the District Court and by the Court of Appeals.

The McKee Grand Jury began deliberations at Miami in September 1960 (Tr. 516). Soon afterwards the initial attack was made on the juror selection procedures prevailing in the Orlando Division of the Southern District of Florida. See *United States* v. *Hoffa* (S. D. Fla., 1961), 196 F. Supp. 25. On March 22, 1961, in the *Meyer* case, the first motion to dismiss a McKee Grand Jury indictment because of the selection procedures in the Miami Division was filed (Tr. 542) and on May 25, 1961, the District Court heard the evidence on which petitioners' showing here is based (Tr. 209).

Although the McKee Grand Jury indictments were subject to grave question based on evidence which was then known to all concerned, the United States permitted that Grand Jury to continue its deliberations throughout and beyond the summer of 1961. Petitioner was not indicted

until August 2 (Tr. 9), over two months after the facts regarding jury selection were known. When Judge Simpson finally ruled in *Meyer* on December 16, 1961 (Tr. 545), rulings by other judges soon followed in other criminal cases in which the question was raised on the *Meyer* record (Tr. 546, 549).

Upon conviction, petitioner appealed to the United States Court of Appeals for the Fifth Circuit, a tribunal that could be expected to provide a wholly disinterested review of the selection procedures followed by the jury officials and approved by several district judges. On the day of oral argument petitioner was confronted with the fact that District Judge George W. Whitehurst—who had been Chief Judge of the District when the Miami Division jury box was filled and replenished in the manner complained of, when the McKee Grand Jury was sworn, when the initial attacks on the juror selection procedures in the Orlando and Miami Divisions were made (169 F. Supp xi, 191 F. Supp. xi), and who personally had adjudged guilty and sentenced two persons under indictment by the McKee Grand Jury (Tr. 620)—had been designated to sit as a member of the three-judge panel that was to consider petitioner's appeal.

The decision of the Court of Appeals in this case was determined by Judge Whitehurst's vote for affirmance, in the circumstance of a difference of opinion between Judges Cameron and Brown. For himself and Judge Cameron, Judge Whitehurst delivered the opinion of the court. Judge Brown dissented (see Appendix A).

Chance petitioned for a rehearing and filed a separate motion for a rehearing en banc. In this petitioner was supported by four members of the bar of the Court of Appeals who, because they represented defendants in criminal cases who also had attacked the validity of the Grand Jury, had been permitted to file amici briefs (see Tr. 582, 590, 599). One of the principal grounds of petitioner's motion for rehearing en banc was the impropriety of Judge Whitehurst's participation (Tr. 590-97).

On May 5, 1964, a panel consisting of Judge Brown and Judge Whitehurst, who recited that Judge Cameron joined in the disposition prior to his death, denied rehearing (Appendix B). No separate order was entered on petitioner's motion for rehearing en banc.

It was illegal for the United States jury officials to ignore the mandate of Congress in selecting prospective jurors. It was improper for the District Court to let stand an indictment returned by the McKee Grand Jury. It was especially improper for the District Court, knowing all of the circumstances surrounding the selection of that Grand Jury, to permit that group to continue to exercise the power to indict. It was improper for the Court of Appeals to designate Judge Whitehurst as a member of the panel hearing petitioner's appeal and it was improper for him to sit as a member of that panel. It was improper for the Court of Appeals to let stand, without at least en banc review, a decision that was determined by Judge Whitehurst's vote and announced by his opinion. It was improper for the Court of Appeals to permit Judge Whitehurst to participate in the consideration of petitioner's requests for rehearing and for rehearing en banc.

This criminal proceeding has thus far been marked by repeated failures by officials of the United States to administer criminal justice in an appropriate way. In each of the courts below petitioner seriously questioned the standards of judicial administration that apparently prevailed in that court. Each court gave the standards heretofore announced by Congress and by this Court a most grudging and narrow interpretation. In doing so, those courts neglected this Court's admonition that United States judges are not "mere moderators." [*Quercia v. United States* (1933), 289 U. S. 466, 53 S. Ct. 698, 77 L. Ed. 1321] and abandoned the principle that

> "[T]o perform its high function in the best way 'justice must satisfy the appearance of justice.'"
>
> *In Re Murchison* (1955), 349 U. S. 133, 136, 75 S. Ct. 623, 625, 99 L. Ed. 942.

Conclusion.

The writ of certiorari should be granted.

Respectfully submitted,

J. Edward Worton
548 Pan American Bank Building
Miami 32, Florida

Joseph P. Manners
Industrial National Bank Building
Miami 32, Florida

W. G. Ward
1240 duPont Building
Miami, Florida

Chester Bedell
1520 Barnett National Bank Building
Jacksonville, Florida

Attorneys for Petitioner.

Index to Appendix.

	PAGE
Appendix A—Judgment and Opinion of the Court....	21
Appendix B—Order and Opinion on Petition for Rehearing	34
Appendix C—Sections of Florida Statute Relevant to the Case.....	39

Appendix A.

Judgment and Opinion of the Court.

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

October Term, 1962
No. 19,597

D. C. Docket No. 12,240-M-Cr.

ALVIN CHANCE,

Appellant,

versus

UNITED STATES OF AMERICA,

Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF FLORIDA.

Before CAMERON and BROWN, Circuit Judges, and WHITEHURST, District Judge.

JUDGMENT.

This cause came on to be heard on the transcript of the record from the United States District Court for the Southern District of Florida, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed.

"Brown, Circuit Judge, dissents"

August 27, 1963

Issued as Mandate:

Appendix A.

OPINION OF COURT.

IN THE

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 19597

ALVIN CHANCE,

Appellant,

versus

UNITED STATES OF AMERICA,

Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF FLORIDA.

(August 27, 1963.)

Before CAMERON and BROWN, Circuit Judges, and WHITEHURST, District Judge.

WHITEHURST, District Judge: The question before us is whether the court below erred in denying appellant's motion to dismiss the indictment on the ground that the grand jury which returned it was summoned and empaneled contrary to law. We hold that it did not.

The grand jury attacked is that drawn in 1960 from the Miami box covering primarily Dade and Broward counties. In Dade County the names were obtained from

three sources: (a) the list of male registered voters;[1] (b) the list of women who had registered for jury service;[2] and Negro citizens recommended by local Negro ministers and business leaders.[3] In Dade County, names obtained from the list of voters were chosen from scattered precincts in an effort to avoid choosing as prospective jurors those who may have served within the past few years. A map was kept in the clerk's office and when precincts had been selected in filling the previous box in 1957, those precincts had been marked. The precincts used in the 1959 box (from which the instant jury was drawn) were marked with a contrasting color. No names had been taken from the voter lists in precincts predominantly Negro, but many had doubtless been selected from those precincts among the names furnished by Negro leaders.

In Broward County, a few names of male voters were taken at random from each precinct. In addition, the list of women who had registered for state jury service was used. The box was filled in June and July of 1959 with five thousand names; in December, 1959 it was discovered that no names from the Miami Beach and Coral Gables communities had been selected and an additional one thousand names from those areas were added.

---

[1] In Florida, state jurors must be "duly qualified electors": F. S. A. §40.01 "Qualifications and disqualifications of jurors.

"(1) Grand and petit jurors shall be taken from the male and female persons over the age of twenty-one years, who are citizens of this state, and who have resided in the state for one year and in their respective counties for six months, and who are duly qualified electors of their respective counties; provided, however, that the name of no female person shall be taken for jury service unless said person has registered with the clerk of the circuit court her desire to be placed on the list . . ."

[2] In Florida, only women who register for jury service are qualified to serve. F. S. A. §40.01. Footnote 1.

[3] The record indicates that the Negro population of Dade and Broward counties is approximately twelve percent of the total population; approximately ten percent of the names placed in the box were those of Negroes.

Appendix A.

Appellant and *amici*, coming forward with a multiplex attack on the makeup of the grand jury, argue that (1) selection of names from the state voter registration lists is unlawful *per se;*[4] (2) Negroes were excluded; (3) Women were excluded; (4) the names did not represent a cross-section of the community; (5) the names of three hundred qualified persons[5] were not present in the box; and (6) the names were not properly placed[6] in the box.

Thiel v. *Southern Pacific Company*, 1946, 328 U. S. 217, lists six groups or classes which may not be excluded as jurors: economical, social, religious, racial, political, geographical. This listing should form the basis of our judgment as we consider the several points of attack.

(1) The use of voter registration lists is not unlawful *per se*. *Gorin* v. *United States*, 1 Cir., 1963, 313 F. 2d 641;

---

[4] By the Civil Rights Act of 1957, the requirement that federal jurors be eligible for state juries was abolished. 28 U. S. C. A. §1861, as amended, establishes the current qualifications for federal jurors:

"Any citizen of the United States who has attained the age of 21 years and resides within the judicial district, is competent to serve as a grand or petit juror unless:

"(1) He has been convicted in a state or federal court of record of a crime punishable by imprisonment for more than one year and his civil rights have not been restored by pardon or amnesty.

"(2) He is unable to read, write, speak and understand the English language.

"(3) He is incapable, by reason of mental or physical infirmities to render efficient jury service."

[5] 28 U. S. C. A. §1864.

"Manner of drawing; jury commissioners and their compensation

"The names of grand and petit jurors shall be publicly drawn from a box containing the names of not less than three hundred qualified persons at the time of each drawing. . . .

"The jury commissioner and the clerk, or his deputy, shall alternately place one name in the jury box without reference to party affiliations, until the box shall contain at least 300 names or such larger number as the court determines. . . ."

[6] See footnote 5.

Appendix A.

United States v. *Greenberg*, D. C. N. Y. 1961, 200 F. Supp. 382; *United States* v. *Van Allen*, D. C. N. Y. 1962, 208 F. Supp. 331; *cf. United States* v. *Henderson*, 7 Cir., 1962, 298 F. 2d 552. The use of voter registration lists is unlawful only if such use is a subterfuge to exclude systematically and intentionally members of those groups or classes, inasmuch as those who fail to register are not a cognizable class, *Gorin*, at page 644:

> "For a variety of reasons we reject the argument that eligible persons who do not register to vote constitute a 'political group' in the community. In the first place the group does not include only the politically inert. It includes also the politically alert who may perhaps have lived for a year or more in the district but not long enough in their ward to be eligible to register to vote. In the second place, the group has no distinct or definable outlines, for in addition to persons who have just moved into a ward, it includes not only the completely apathetic but also those who might register to vote only when interested in a particular election. It includes persons of varying shades of political interest. And in the third place we think the Court in referring to a political group in the *Thiel* case meant the member of some defined political party or group.
>
> "This does not mean blanket endorsement of jury selection directly or indirectly from voting lists. It means that voting lists may be used as the basis for jury selection unless it appears that in the community there is systematic and intentional exclusion from those lists of a particular economic, social, religious, racial, geographical or political group. When such a showing is made some other basis of selection must be used. Here, however, the appellants have not shown that in Boston any enumerated class is systematically and intentionally

> discriminated against in registering to vote. Indeed the evidence is quite to the contrary. The appellants' contention fails for lack of any evidence of discrimination in the preparation of the lists of Boston voters. Compare United States *v.* Hoffa, 196 F. Supp. 25 (S.D. Fla., 1961), with United States *v.* Greenberg, 200 F. Supp. 382 (S.D. N. Y., 1961)."

The only decision to the contrary is *United States* v. *Hoffa*, D. C. Fla., 1961, 196 F. Supp. 25, which is distinguishable on its facts. There, male voter registration lists and lists of women who volunteered for state jury services (who were necessarily registered to vote) were the exclusive sources of names. Such is not the case here. Even assuming that the *Gorin* case was not correctly decided, this case is not one in which those who failed to register were systematically and intentionally excluded and, even under *Hoffa*, the grand jury would not be illegal as a matter of law.

(2) The record indicates that members of the Negro race constitute approximately twelve percent of the population of Dade and Broward counties and that approximately ten percent of the names in the box were those of Negroes. The contention that Negroes were excluded or represented only in a "token" fashion is untenable.

(3) Before 1957 one of the disqualifications for federal jury service was that "He is incompetent to serve as a grand or petit juror by the law of the state in which the district court is held." 28 U. S. C. A. §1861 (4) (repealed). *Ballard* v. *United States*[7] held that in states *in which women were not disqualified to sit on state juries*, the systematic and intentional exclusion of women from federal juries was unlawful. The amendment of the federal statute in 1947 merely removed subsection (4) of 28 U. S. C. A. §1861 and in effect made *Ballard* controlling

[7] 1946, 329 U. S. 187.

in all states, whether women were disqualified from state jury service or not. The effect, therefore, is to condemn the systematic and intentional exclusion of women from federal juries. It is clear that women were not excluded as a matter of fact, much less by any system, from the grand jury here in question. The record indicates that three women served on the panel under attack.

(4) Appellant's main contention is that the grand jury did not represent a cross-section[8] of the community. At the most, the notion of a jury as a cross-section of the community is a conceptual[9] one. A literal cross-section is neither required nor desired. Those persons who have been convicted of a crime and not pardoned, those not competent in the English language, and those mentally or physically infirm are disqualified under 18 U. S. C. A. §1861. Many people and classes are granted exemptions and exclusions under 28 U. S. C. A. §§1862, 1863. In many sections of this country, a Spanish-speaking community is predominant. An English-speaking jury is certainly not a "cross-section" of such a community.

Nobody contends that to obtain a "cross-section" it would be required that names be taken at random from the

---

[8] United States *v.* Foster, 1949, D. C. N. Y. 83 F. Supp. 197, 201, says that the law requires a "fair and impartial cross-section of the community." The phrase "cross-section" was used in Glasser *v.* United States, 1942, 315 U. S. 60, 86; Thiel *v.* Southern Pacific Co., *supra* at 200; Ballard *v.* United States, *supra*, at 191. Glasser, at p. 85, quoted from Smith *v.* Texas, 1940, 311 U. S. 128, 130: "It is part of the established tradition in the use of juries as instruments of public justice that the jury be a body truly representative of the community." *Cf.* Gorin *v.* United States, *supra* at p. 644, ". . . it has never been the law that a jury must represent a true cross-section of the community. See Report of the Committee on the Operation of the Jury System to the Judicial Conference of the United States, September, 1962, at page 6 . . ."

[9] Webster's New International Dictionary, Second Edition, Unabridged, 1955: "Concept . . . 2. *Philos.* An idea, as distinguished from a precept; . . ."

"Precept . . . 1. An authoritative command; order; mandate . . ."

totality of the inhabitants of the area in order to comply with 28 U. S. C. A. §1861. No particular pattern has been prescribed for use by the jury commission in determining the source of jury personnel, however, suggestions are to be found in the report of the Judicial Conference Committee on the Operation of the Jury System, 26 F. R. D. 409, 470. As Judge Learned Hand so cogently stated:

> "It is perhaps in order to say a word about the phrase itself—"cross-section,"—because the defendants so much rely upon it. It means the fair sample; and a sample drawn at random from the whole community will of course represent the distribution of wealth in the community as a whole, as it would represent the distribution of age, height, predisposition to sclerosis, or any other characteristic; but nobody contends that the list must be a sample of the whole community. Minors and the aged are excluded, as are the insane and those of unsound mind, and practically so are all the exempt; a sample at random with any of those included would be different from that which concededly the law may and does prescribe." *United States v. Dennis*, 2 Cir., 1950, 183 F. 2d 201, 224, affirmed, 1951, 341 U. S. 894.

The use of names from scattered precincts in a county is not in and of itself unlawful unless it be demonstrated that, in so doing, some cognizable group described in *Thiel, supra*, is thereby systematically and intentionally excluded. A question of fact is raised here, as is so in most cases. The court below found that there was no such exclusion and we cannot say that such a finding was clearly erroneous. The record clearly indicates, moreover, that the officials here involved made a positive and conscientious effort to choose a fair sample of the community for jury service.

The statutes provide no affirmative requirements of the officials in gathering names for the jury box. See *United States v. Greenberg*, D. C. N. Y., 1961, 200 F. Supp. 382. In

fact, some standard system to be followed was advocated by certain of the senators in the debates over the Civil Rights Act of 1957, and the criticism of the present system advanced was that there was no such requirement. See Congressional Record, Vol. 103, Pt. 10. The Congress did not, however, adopt these arguments and the law as it now stands places the officials under no mandatory or positive commands; they are, on the contrary, controlled by one negative requirement: they may not discriminate,[10] directly or indirectly.

---

[10] As pointed out in United States *v.* Flynn, 2 Cir., 1954, 216 F. 2d 354, "a fair sample" is all that is required to meet the legal definition of a cross-section of the community. Proportional representation is not necessary, either as a constitutional requirement, Hoyt *v.* Florida, 1961, 368 U. S. 57; Fay *v.* New York, 1947, 332 U. S. 261; Akins *v.* Texas, 1945, 325 U. S. 398, or to meet the statutory standards for federal courts, United States *v.* Flynn, *supra*; Dow *v.* Carnegie-Illinois Steel Corp., 3 Cir., 1955, 224 F. 2d 414; United States *v.* Dennis, 2 Cir., 1950, 183 F. 2d 201, affirmed 1951, 341 U. S. 494; United States *v.* Greenberg, *supra*; United States *v.* Romano, D. C. Conn. 1961, 191 F. Supp. 772; United States *v.* Fujimoto, D. C. Hawaii, 1952, 102 F. Supp. 890; United States *v.* Foster, D. C. N. Y. 1949, 83 F. Supp. 197. As the matter was put in Flynn, answering an asserted ground for reversal ("Failure of Jury Clerks to Employ Methods Which Would Insure Representation of a Cross-section") which is almost a paraphrase of appellant's and *amici's* contentions here:

> [P. 388] "We need devote little time to this phase of the challenge, for it is palpably a plea for proportional representation, or at least something approaching it, which has never been a part of the Anglo-American jury system and, indeed, is repugnant to that system."

And as Judge Medina phrased it in United States *v.* Foster, *supra*, a particularly apposite reply to the position urged here by appellant and *amici*:

> [P. 208] "In the last analysis this challenge comes down to the assertion, contrary to all legal precedents, that those who administer the jury system must by some means produce a jury list which shall have proportional representation of Negroes, manual workers, poor people, and members of various racial and religious groups. Any attempt to secure such representation would not only result in chaos and confusion but, in my judgment, would inevi-

(5) Appellant contends that the statutory requirements were not met in that the names were not drawn "from a box containing the names of not less than three hundred qualified persons," 28 U. S. C. A. §1861. This argument rests upon the failure of the officials to determine individually the qualification of each of the six thousand prospective jurors before his or her name was put in the box. If the jury officials had substantial information concerning the eligibility of the prospective jurors, it is not necessary that a conclusive decision be made as to each name. This whole question was dealt with recently by the Court of the Eighth Circuit in *Beatrice Foods Co.* v. *United States*, 1963, 312 F. 2d 29, and we quote in the margin an extended excerpt from that case beginning at page 35.[11]

---

tably breed the very intolerance which every right-minded person should be vigilant to avoid"

There thus being no necessity to strive for proportional representation, "All that is expected of the jury officials charged with the duty of providing a pool of qualified jurors is that the methods of selection used are reasonably designed to produce a representative cross-section of the community in the light of the practical means available." United States *v.* Greenberg, *supra*, p. 389. The efforts of the jury officials are, of course, subject to judicial scrutiny, but the intensity of the scrutiny is to be tempered by the leavening of practicality. As was observed in Dow at p. 427, "Practical considerations nonetheless are relevant in a determination of the reasonableness of methods." See also United States *v.* Henderson, 7 Cir., 1962, 298 F. 2d 523; United States *v.* Local 36 of International Fishermen, S. D. Cal., 1947, 70 F. Supp. 782.

[11] "It was suggested long ago that the placing of names of qualified persons in the jury box is mandatory. United States *v.* Chaires, C. C. N. D. Fla., 1889, 40 F. 820, 821. Since then, some courts have specifically so held. United States *v.* Silverman, D. Conn., 1955, 129 F. Supp. 496, 511; United States *v.* Brandt, N. D. Ohio, 1955, 139 F. Supp. 362, 365. It has been said, too, that the duty of selection cannot be delegated by jury officials. Glasser *v.* United States, 1942, 315 U. S. 60, 85. However, Congress has prescribed no particular method of jury selection. 'The choice of the means . . . rests largely in the sound discretion of the trial courts and their officers' under the guidance of the pertinent statutes. Thiel *v.* Southern Pacific Co., *supra*, pp. 220-21 of 328 U. S.; Glasser *v.* United States, *supra*, p. 86 of 315 U. S. There is a presumption that the jury officials have discharged their duties

Appendix A.

The statute requires that the box contain names of "not less than three hundred qualified persons." Most of the names were taken from voter lists and most Florida

---

properly. Poliafico *v.* United States, 6 Cir., 1956, 237 F. 2d 97, 110, cert. den. 352 U. S. 1025; United States *v.* Fujimoto, D. Hawaii, 1952, 105 F. Supp. 727, 729. When the defense claims the existence of a fatal flaw in the selection process it has the burden of overcoming that presumption. Frazier *v.* United States, 1948, 335 U. S. 497, 503; United States *v.* Silverman, *supra*, p. 511 of 129 F. Supp.; Walker *v.* United States, 8 Cir., 1937, 93 F. 2d 382, 392, cert. den. 303 U. S. 644; Bailey *v.* Henslee, 8 Cir., 1961, 287 F. 2d 936, 942, cert. den. 368 U. S. 871.

"Accepting all this, we are not persuaded by Beatrice's challenge to the array.

[P. 36] "(c) The questionnaires employed were not as desirably complete as they might have been. They did not inquire for example, as to a prospect's fluency in English, as to his criminal record and as to his mental and physical capacities. Yet they did advise him of the purpose of the questionnaire itself and they did inquire as to his being a a voter. The filling out of the form and its return would result in some indication of the prospect's language ability and of his infirmities. Voting status under Nebraska law would presumably show United States citizenship, at least six months' residence in the district, R. R. S. Neb. 1943 §32-102, and something as to criminal record, R. R. S. Neb. §§29-112 and 29-102. The information requested as to age, occupation and employer is not completely unrevealing as to capacity. Furthermore, the letter to each sponsor quoted §1861. The sponsor therefore knew exactly what was required for those he was to recommend as prospective jurors. We are not free to presume that he ignored these requirements. . . .

[P. 37] "(h) Although perfection in jury selection is of course desired, it is too much to expect that the system in every federal judicial district will be conducted and will operate with the precision of a fine timepiece. Perfect performance is not required. United States *v.* Brandt, *supra*, p. 365 of 139 F. Supp. This is why we have the many safeguards consisting of the use of the box itself, the drawing of names from it, the large number of names required, and the like. At the very most, there were mere irregularities in the selection of the grand jury which indicated Beatrice and its co-defendants. In the absence of individual prejudice to the defendant, these do not justify dismissal of the indictment. [Citing cases.]"

voters[12] are eligible for federal jury service. Presumably the Negro leaders who furnished names were guided by the proper standards. We do not think the court below was clearly in error in holding that there were names of three hundred qualified persons in the box; the evidence is overwhelming that there were.

(6) The last objection is to the physical manner in which the names were placed in the box. The statute[13] provides that the commissioner and clerk "alternately place one name in the box." It is undisputed that, in this case, the names were placed in the box by alternate handfuls. This is a very technical deviation from the statutory procedure and is no basis for a successful challenge to the grand jury. *Hauptman* v. *United States*, 1930, 9 Cir., 43 F. 2d 86; *Gaughan* v. *United States*, 1927, 8 Cir., 19 F. 2d 897; *United States* v. *McClure*, D. C. Penn. 1933, 4 F. Supp. 668; *United States* v. *Greene*, D. C. Ga. 1902, 113 Fed. 683.

---

[12] F. S. A. §97.041: Qualifications to register. "Any person twenty-one years of age, at the time of registration, upon proof of his birth date, who is a citizen of the United States, a permanent resident living in Florida for one year and residing in the county where he wishes to register for six months is eligible to register with the supervisor when the registration books are open. Naturalized citizens must present to the registration officer a certificate of naturalization or certified copy thereof. The following persons are not entitled to vote:

1. Persons not registered.

2. Persons under guardianship or confined in any state prison.

3. Persons insane or idiotic.

4. Persons convicted of any felony by any court of record and whose civil rights have not been restored.

5. Persons convicted of bribery, perjury, larceny or any infamous crime in this or other state, or interested in any wager depending on the result of any election.

6. Persons not registered to vote in the precinct in which they have their permanent place of residence."

[13] 28 U. S. C. A. §1864, see footnote 6.

Presumably, the two officials agreed as to the names and, in that case, any disagreement which the statutory procedure was intended to settle did not arise.

"Jury lists are not conceived out of thin air." *Thiel* v. *Southern Pacific Co.*,[14] D. C. Cal. 1946, 67 F. Supp. 934, 943. "Congress has not chosen to establish any uniform system of selecting . . . [jurors] but it has left to each district the adoption of suitable methods to obtain the necessary talesmen." *United States* v. *Greenberg, supra*, at p. 388. We hold that the methods used in selecting the grand jury in question were not unlawful and that there was no systematic and intentional exclusion of any cognizable group or class and that there was substantial technical compliance with the statutes. To hold otherwise would be "to make of the grand jury a pawn in a technical game instead of respecting it as a great historic instrument of lay inquiry into criminal wrongdoing." *United States* v. *Johnson*, 1943, 319 U. S. 503, 512.

The judgment appealed from is right and it is AFFIRMED.

BROWN, Circuit Judge, dissenting:

In the face of the very persuasive opinion of Judge Whitehurst, I am reluctant to differ. Nevertheless, I think the practice of including (a) only those males who have registered to vote and (b) only ~~those~~ the females who have *volunteered* for jury service does not meet the requirements, 28 U. S. C. A. §1861, of a constitutionally empaneled Grand Jury. I therefore align myself with Judge Lieb's opinion in *United States* v. *Hoffa*, S. D. Fla., 1961, 196 F. Supp. 25, and respectfully dissent from the present opinion of this Court.

---

[14] On remand from Thiel v. Southern Pacific Co., 1946, 328 U. S. 217.

Appendix B.

Order and Opinion Upon Petition for Rehearing.

[Same Title.]

(, 1964)

On Petition for Rehearing.

Before Brown, Circuit Judge, and Whitehurst, District Judge* Per Curiam:

It is Ordered that the petition for rehearing filed in the above entitled and numbered cause be, and the same is, hereby denied.

---

* Judge Cameron joined in this disposition just prior to his death.

Appendix B.

[SAME TITLE.]

(May 5, 1964.)

OPINION UPON PETITION FOR REHEARING

Before BROWN, Circuit Judge, and WHITEHURST, District Judge.*

PER CURIAM: In the Petition for Rehearing the Appellant (1) attacks the substantive merits of the Court's opinion and (2) as new matter challenges the legality or propriety of Judge Whitehurst's participation in the decision of this Court as a Judge designated and assigned to sit as a member thereof under 28 USCA §292(a), 43(b). The Court is unanimously of the view that the challenge is unfounded and adopts as its own the following from the opinion prepared by Judge Cameron just prior to his death:

Alvin Chance was indicted by a grand jury in the United States District Court for the Southern District of Florida, Miami Division, on August 2, 1961, on a charge of violation of and conspiracy to violate §§5205(a), 5604(a)(1), 5686(a), and 7206(4) of Title 26, U.S.C. (possession, transportation, removal and concealment of non-taxpaid whiskey), and was tried before a jury and convicted March 6, 1962. On March 23, 1962, he was sentenced to one year and one day imprisonment, and gave notice of appeal to this Court on March 30, 1962. He promptly entered upon the service of his term of imprisonment, however, and was released on December 28, 1962. Meantime, he had, on December 4, 1962, filed his brief in this Court. During the months of December 1962 and January 1963, six attorneys appeared and filed or joined in briefs as *amici curiae*, having been granted permission so to do by orders of this Court. These attorneys represented litigants who had been indicted by the same grand jury as Chance.

* As reflected in the opinion, Judge Cameron had joined in this disposition just prior to his death.

Appendix B.

The judgment of conviction was appealed to this Court upon the charge that the court below had erred in denying the appellant's motion to dismiss the indictment on the ground that the grand jury which had returned it had been summoned and empaneled contrary to law. The appeal was heard by a panel of this Court consisting of Judges Cameron and Brown, Circuit Judges, and Judge Whitehurst, District Judge. The opinion, 322 F. 2d 201, *et seq.*, was filed by Judge Whitehurst with the concurrence of Judge Cameron, Judge Brown dissented.

Judge Whitehurst had retired as a District Judge, but was serving upon special designation as a member of this Court.

The case was argued and submitted on April 8, 1963, and was in due time decided by the Court. At no time until the petition for rehearing was filed did any lawyer mention the possibility that Judge Whitehurst might be disqualified to participate in the decision of the case. Some of the attorneys who appeared as *amici curiae* were present at the time of the oral argument and the attorney representing appellant Chance was, at that time and is now, attorney for other litigants interested in the same question which was presented in the *Chance* case.

The essence of appellant's contention, joined in by each of the *amici*, is that Judge Whitehurst, having been Chief Judge of the Southern District of Florida, "may not reasonably be regarded as occupying a position of strict impartiality in respect to the validity of the jury selection procedures that prevailed in that district." In support of this contention, appellant points out that Judge Whitehurst was chief judge of said district from May 1, 1959 until May 18, 1961; that during his tenure, the Miami jury box was replenished, the challenged grand jury was drawn from the replenished box and empaneled; an indictment was returned by said grand jury in the case of *United States* v. *Meyer, et al.*, No. 12,007-M-Cr. from which the record in this case derives, and a chailenge to the grand

jury was asserted in that case; that during his tenure, the Orlando jury box was also filled and thereafter successfully challenged; that Judge Whitehurst himself presided at the trial of, and sentenced after conviction, two defendants indicted by the challenged grand jury. Appellant argues that "it is unrealistic to suppose that until this case was submitted to this Court Judge Whitehurst was unconcerned with and without knowledge of and attitudes about the juror selection procedures prevailing in the district."

Appellant does not charge, however, that a jury challenge was raised in either of the two cases mentioned or that Judge Whitehurst ever actually considered and ruled on a jury challenge or was advised that any such challenge had been made. The indictment here was returned and the jury challenge filed in this case after the expiration of Judge Whitehurst's tenure as chief judge.

It is the Government's position that Judge Whitehurst's presence on the panel that heard and considered this case was not error and furthermore that, under all of the circumstances, appellant's failure to make timely objection to the presence of Judge Whitehurst on the panel constituted a waiver, alleviation or absolution of any possible objection to his acting on the panel which heard the case.

Appellant never specifically points out why Judge Whitehurst may have been disqualified. A disqualification is normally predicated upon one of the two statutes copied in the margin.[1]

---

[1] 28 U.S.C.A. §47:

"Disqualification of trial judge to hear appeal.

"No judge shall hear or determine an appeal from the decision of a case or issue tried by him."

28 U. S. C. A. §455:

"Interest of justice or judge.

"Any justice or judge of the United States shall disqualify himself in any case in which he has a substantial interest, has been of counsel, is or has been a material witness, or is so related to or connected with any party or his attorney as to render it improper, in his opinion, for him to sit on the trial, appeal, or other proceeding therein."

Appendix B.

It is obvious that Judge Whitehurst did not, as a trial judge, decide this case nor try any issue relating to it. He had not previously "expressed or formed an opinion in the court of first instance." *Moran* v. *Dillingham*, 174 U. S. 153, 157. The issue had never been raised in cases tried by him (assuming that it be material that he had presided at the trial of other defendants indicted by the grand juries in question), and he had nothing to do with the proceeding in this case before it was appealed. He had made no prior ruling on the question presented here in this case or in any other case.

The grand jury involved here is a different grand jury from that which returned the indictment dismissed by Judge Lieb in *United States* v. *Hoffa*, 196 F. Supp. 25. Although Judge Whitehurst was chief judge at the time the indictment in which the *amici* are interested was returned, he had moved away from the vicinity of the trial and was making his home in Tampa and sat in Miami only occasionally. Judges Simpson and Dyer, of the District Court for the Southern District of Florida, had heard motions to quash the indictment here involved and had denied the motions.

The farthest appellants go is to charge by insinuation that Judge Whitehurst must have known or have constructively acquired prior knowledge concerning the grand jury selection in the Southern District of Florida. In our opinion, this charge is not material. If this were not so, it would logically follow that all Southern District of Florida District Judges were disqualified to hear initially grand jury challenges in that district.

We find that the rash and unjustified attack made upon Judge Whitehurst's participation in the decision of this case is wholly without merit. By his concurrence in this opinion, Judge Whitehurst certifies that he knows of no fact or thing which, under the law, would tend to disqualify him from participating in the decision of this case.

The Petition for Rehearing is DENIED.

Appendix C.

Sections of Florida Statutes Relevant to the Case.

40.01 Qualifications and disqualifications of jurors.—(1) Grand and petit jurors shall be taken from the male and female persons over the age of twenty-one years, who are citizens of this state, and who have resided in the state for one year and in their respective counties for six months, and who are duly qualified electors of their respective counties; provided, however, that the name of no female person shall be taken for jury service unless said person has registered with the clerk of the circuit court her desire to be placed on the jury list.

(2) No person who shall have been convicted of bribery, forgery, perjury, or larceny within this state or under the laws of any other state, government or country, or who shall have been convicted within this state of a felony, or under the laws of any other state, government or country of a crime which, if committed within this state, would be a felony, shall be qualified to serve as a juror unless restored to civil rights.

. . .

97.041 Qualifications to register.—Any person twenty-one years of age, at the time of registration, upon proof of his birth date, who is a citizen of the United States, a permanent resident living in Florida for one year and residing in the county where he wishes to register for six months, is eligible to register with the supervisor when the registration books are open. Naturalized citizens must present to the registration officer a certificate of naturalization or certified copy thereof. The following persons are not entitled to vote:

1. Persons not registered.

2. Persons under guardianship or confined in any state prison.

3. Persons insane or idiotic.

~~*Sections of Florida Statutes Relevant to the Case.*~~

4. Persons convicted of any felony by any court of record and whose civil rights have not been restored.

5. Persons convicted of bribery, perjury, larceny or any infamous crime in this or other states, or interested in any wager depending on the result of any election.

6. Persons not registered to vote in the precinct in which they have their permanent place of residence.

INDEX

	Page
Opinions below	1
Jurisdiction	1
Question presented	2
Statement	2
Argument	6
Conclusion	12

CITATIONS

Cases:

Ballard v. *United States*, 329 U.S. 187	7
Beatrice Foods Co. v. *United States*, 312 F. 2d 29, certiorari denied 373 U.S. 904	10
Dow v. *Carnegie-Illinois Steel Corporation*, 224 F. 2d 414, certiorari denied 350 U.S. 971	8
Fiswick v. *United States*, 329 U.S. 211	2
Gaughan v. *United States*, 19 F. 2d 895	11
Gorin v. *United States*, 313 F. 2d 641, certiorari denied, 374 U.S. 829	7, 9
Hauptman v. *United States*, 43 F. 2d 86	10
Hernandez v. *Texas*, 347 U.S. 475	6
Hoyt v. *Florida*, 368 U.S. 57	7
Pollard v. *United States*, 352 U.S. 354	2
United States v. *Agueci*, 310 F. 2d 817, certiorari denied, 372 U.S. 959	7
United States v. *Dennis*, 183 F. 2d 201, affirmed, 341 U.S. 494	8
United States v. *Flynn*, 216 F. 2d 354, certiorari denied, 348 U.S. 909	8

736-840 - 64

Cases—Continued

	Page
United States v. *Henderson*, 298 F. 2d 522, certiorari denied, 369 U.S. 878	9
United States v. *Hoffa*, 196 F. Supp. 25	9
United States v. *Meyer*, 113 F. 2d 387, certiorari denied, 311 U.S. 706	10
United States v. *Morgan* 346 U.S. 502	2
United States v. *Silverman*, 129 F. Supp. 496	10
Young v. *United States*, 212 F. 2d 236, certiorari denied, 347 U.S. 1015	7

Statutes:

28 U.S.C. 47	11
28 U.S.C. 455	11
28 U.S.C. 1861	5, 8, 10, 11
28 U.S.C. 1864	9, 12
Florida Statutes; § 40.01	10
Florida Statutes; § 97.041	10

Miscellaneous:

103 Cong. Rec. 13154, 13157, 13249, 13250, 13277, 13290–13291, 13317, 13325–13326	9
U.S. Census of Population, 1960, General Population Characteristics Report, Series PC(1)—11B, Tables 27 and 28, Florida	3–4

In the Supreme Court of the United States

OCTOBER TERM 1964

No. 151

ALVIN CHANCE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (R. 565–578) is reported at 322 F. 2d 201. The opinion of the court of appeals denying the petition for rehearing (R. 659–664) is reported at 331 F. 2d 473.

JURISDICTION

The judgment of the court of appeals was entered on August 27, 1963. A petition for rehearing was denied on May 5, 1964. The petition for a writ of certiorari was filed on June 4, 1964. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the procedure used in the selection of the grand jury which indicted petitioner required dismissal of the indictment.

STATEMENT

Petitioner was convicted in the United States District Court for the Southern District of Florida (Miami Division) on three counts of an indictment charging possession, transportation, removal and concealment of non-taxpaid whiskey (R. 13). On March 23, 1962, he was sentenced to one year and one day on each count, the sentences to run concurrently (R. 16–17). He promptly entered upon the service of his sentence, and was released on December 28, 1962 (R. 659). Nevertheless, an appeal was brought on his behalf, urging as the sole error the denial of his motion to dismiss the indictment on the asserted ground that the grand jury was not selected, drawn or summoned in accordance with law.[1] No challenge was made to the petit jury.

The record regarding procedures used in selecting the grand jury may be summarized as follows:

1. The Miami Division of the United States District Court for the Southern District of Florida maintains three separate jury wheels or jury boxes: one for Miami (covering, primarily, Dade and Broward Counties), one for Fort Pierce, and one for West Palm

[1] Other attorneys whose clients had been indicted by the same grand jury appeared and filed or joined in briefs as *amici curiae*. Since petitioner's conviction of a felony may have collateral consequences, we do not believe that the fact that he has served his term of imprisonment renders this case moot. See *Pollard* v. *United States*, 352 U.S. 354, 358; *United States* v. *Morgan*, 346 U.S. 502, 512–513; *Fiswick* v. *United States*, 329 U.S. 211, 220–221.

Beach (R. 251). The Miami box was completely refilled with 5,000 names (R. 242) in June and July 1959 (R. 236, 260). In August 1960, the district court ordered a grand jury drawn from this box (R. 275). The jury was empanelled on September 6, 1960, and petitioner was indicted on August 2, 1961 (R. 9).

In both Dade and Broward Counties, the major source used was male names taken from voter registration lists. In Broward, names were taken at random from each of the county's precincts (R. 282–283); in Dade, names were taken from 43 assorted precincts of the 210 in the county (R. 236, 346, 519, 524). The selected precincts were geographically distributed throughout the county (R. 519),[2] and precincts other than those used in 1957 were chosen to avoid drawing the same names twice in a short period of time (R. 278–279). In addition, volunteers were accepted (R. 265). Some 40 to 60 names were obtained in that fashion (R. 266).[3]

2. Approximately 10 percent of the names placed in the jury box were Negroes (R. 238).[4] Only six

[2] In December 1959, it was discovered that Miami Beach and Coral Gables had inadvertently been neglected when names were taken from the precinct lists in June and July (R. 242–243, 265). On the oral order of the district court (R. 245), 1,000 additional names were selected from precincts in those two sections of the county and added to the jury box (R. 242–243, 265). Names of male and female volunteers were also added to the box at that time (R. 266).

[3] It is not clear whether these 40 to 60 names were male or female or a mixture of both (compare R. 266 with R. 292).

[4] Slightly over 12 percent of the adult population of both Dade and Broward Counties are Negro, the figures being 75,573 out of 613,021 for Dade and 27,009 out of 216,526 for Broward. U.S. Census of Population, 1960, General Population Characteristics Report, Series PC(1)-11B, Table 27, Florida. Census

percent of the registered voters in Dade County were Negro (R. 518), and it appears that the precincts selected were predominantly white precincts (R. 348–358, 519, 524–525). However, a special solicitation of Negro ministers and organizations was made to obtain names of Negroes. (R. 240).

3. Women's names were obtained from a list of volunteers for jury service (R. 239). Before November 1959, only those who had registered for state jury service at the Dade and Broward County courthouses appeared on the list (*ibid.;* R. 261); women who volunteered for federal jury service were told that they were eligible only if they registered at the county courthouses (R. 239). In November, however, the clerk's office was informed by the Administrative Office of the United States Courts that women were to be eligible for federal jury service whether or not they had registered with the State (*ibid.;* R. 261). Thereafter, women volunteers were accepted at the United States District Court and added to the list of male volunteers, and both sets of names were added to the box when it was replenished in December 1959 (R. 266, 291–292).

Under this arrangement, there were 394 women volunteers registered in Broward County, of whom 215 were actually available for jury service (R. 220), and 1,952 women registered in Dade County (R. 228). Four women were on the panel from which the drawing was made (R. 522–523), and three actually served on the grand jury which indicted petitioner (R. 516).

---

figures are in terms of white and non-white, but non-whites other than Negro are only about one percent of the total non-white population figures for the two counties. *Ibid.*, and Table 28.

4. Prospective volunteers for jury duty were asked three questions at the clerk's office: (1) whether they were citizens, (2) whether they had been residents of Florida for one year, and (3) whether they had been residents of the county for six months (R. 289). A full inquiry of the qualifications of prospective jurors was left to the voir dire (R. 294). In filling the box, the names were first placed in a wastebasket (R. 268). The jury commissioner and the chief deputy clerk then alternately took handfuls of names and transferred them to the box (R. 267).

5. The court of appeals, one judge dissenting, upheld the district court's denial of petitioner's motion to dismiss the indictment. It found that there was no showing of any exclusion of any group or class of potential jurors. It noted that the real gist of petitioner's complaint was that the jury list was not a "literal cross-section" of the community (322 F. 2d at 204; R. 571), and held that such proportional representation is not required. The dissenting judge was of the view that limiting the jury list to males who have registered to vote and females who volunteer for jury service did not meet the requirements of 28 U.S.C. 1861.

6. The panel of the court of appeals included Senior District Judge Whitehurst, who formerly was chief judge of the Southern District of Florida. No objection was made at the time of oral argument to Judge Whitehurst's participation. After the decision of the court of appeals, petitioner moved for a rehearing *en banc*, asserting for the first time that

Judge Whitehurst was disqualified (R. 587, 595–596). He contended that during Judge Whitehurst's tenure as chief judge the grand jury was impanelled and indictments were returned by the challenged grand jury, including the indictment in the case from which the present record is derived.[5] In addition, petitioner contended that Judge Whitehurst presided at the trial of two defendants indicted by the challenged grand jury (R. 595), although no jury challenge was raised in either of these two cases. The petition for rehearing was denied.

ARGUMENT

The district court and the court of appeals properly rejected petitioner's challenges to the selection of the grand jury which indicted him. Since the method used was designed to produce a grand jury which would represent a cross-section of the community and since there was no purposeful exclusion of any cohesive class or group, the selection process was lawful and valid. The fact that some other method might achieve better results does not invalidate the procedure used by the jury commissioner in the present case.

1. It is only cognizable and cohesive classes and groups whose exclusion invalidates a jury-selection system. *Hernandez* v. *Texas*, 347 U.S. 475, 478. Persons who fail to register to vote do not meet any of the standards of cohesiveness necessary to qualify as

[5] By agreement of the parties the record in that case, *United States* v. *Meyer, et al.*, No. 12,007–M–Cr., was adopted for purposes of petitioner's motion to dismiss the indictment (R. 12, 19–20, 208).

a cognizable class, and hence a jury list comprising only voters is not unlawful. *Gorin* v. *United States*, 313 F. 2d 641, 644 (C.A. 1), certiorari denied, 374 U.S. 829; *United States* v. *Agueci*, 310 F. 2d 817, 833–834 (C.A. 2), certiorari denied, 372 U.S. 959; *Young* v. *United States*, 212 F. 2d 236, 238 (C.A.D.C.), certiorari denied, 347 U.S. 1015. Moreover, voting lists were not the exclusive source of male jurors. Volunteers were accepted, and the names of Negro males were obtained through suggestions from Negro ministers and organizations. It was, therefore, entirely proper for the jury commissioner to use voting lists as a primary source for male jurors.

2. Although women do comprise a cohesive class which may not be purposefully excluded (*Ballard* v. *United States*, 329 U.S. 187), the Florida system adopted here was not calculated to exclude women; nor, in fact, did it have any such effect. The system whereby women are accepted for jury duty only if they volunteer has recently been sustained by this Court against constitutional challenge. *Hoyt* v. *Florida*, 368 U.S. 57. And the policy underlying the State practice, which was accepted as reasonable by the Court in *Hoyt*, 368 U.S. at 60–64, also supports the procedure followed in the present case. Moreover, three women actually served on the grand jury which indicted petitioner, and it appears likely that between 26 and 43 percent of the names in the jury box were names of women.[6] Consequently, it cannot be said

[6] The testimony is unclear as to how many names were obtained from the voter lists in June and July, whether all or only some of those so obtained were put in the jury box, and

that the system operated so as to exclude women, or that it was calculated to have any such result.

3. Nor can it be said that the system had the purpose or effect of excluding Negroes. The record demonstrates that approximately 10 percent of the names placed in the jury box were names of Negroes and that Negroes constitute not more than 12 percent of the adult population of the two counties. Moreover, the jury commissioner took affirmative steps to supplement the number of Negro jurors who were selected from voting lists (p. 4, *supra*).

4. Petitioner's basic claim must, therefore, be that jury commissioners are compelled by 28 U.S.C. 1861 to adopt a system which will inevitably produce an actual cross-section of the community. This proposition has been uniformly rejected. *United States* v. *Dennis,* 183 F. 2d 201, 220–224 (C.A. 2), affirmed, 341 U.S. 494; *United States* v. *Flynn,* 216 F. 2d 354, 388 (C.A. 2), certiorari denied, 348 U.S. 909; *Dow* v. *Carnegie-Illinois Steel Corporation,* 224 F. 2d

---

whether all or only some of the women's names obtained from the county courthouses were put in the jury box (R. 262). If the 5,000 names in the box included the 215 available women registered in Broward County and the 1,952 women registered in Dade County, then women comprised 43% of those whose names were in the box (and 36% after December 1959, when the box was supplemented with 1,000 additional names, see note 2, *supra*). If 5,000 names from the voter registration lists were put in and the names of the women registered for state jury duty were then added, then women comprised 30% of those whose names were in the box (and 26% after December).

414, 428 (C.A. 3), certiorari denied, 350 U.S. 971; *Gorin* v. *United States*, 313 F. 2d 641 (C.A. 1), certiorari denied, 374 U.S. 829; *United States* v. *Henderson*, 298 F. 2d 522, 525 (C.A. 7), certiorari denied, 369 U.S. 878.[7] What the statute protects against is the purposeful exclusion of any group of persons who would qualify under its terms. It neither expressly nor impliedly directs that the jury commissioners use any particular method in selecting jurors so long as the method they use is not *calculated* to evade the general objective of achieving a cross-section of the community. Nor can any such direction be read into the statute by reason of its amendment in 1957. The legislative history discloses that the sole purpose of the amendment was to remove an available limitation on the classes entitled to perform jury service; it was not intended to impose any affirmative duties on the federal jury officials. Compare 103 Cong. Rec, 13154, 13157, 13249, 13277, 13325–13326 with 13250, 13290–13291, 13317.

5. Petitioner's objections to the conduct of the jury officials in executing their statutory duties are also without merit. The jury box from which the names were drawn contained some six thousand names, approximately twenty times the minimum statutory requirement of "three hundred qualified persons." 28 U.S.C. 1864. Consequently, even if the jury com-

[7] The decision in *United States* v. *Hoffa*, 196 F. Supp. 25 (S.D. Fla.), relied upon in the dissenting opinion, was by a district court within the circuit below. Any general rule that it can be deemed to have established beyond its own peculiar facts has been impliedly overruled by the court of appeals.

missioner failed to determine in advance whether each of the persons whose name was in the box was fully qualified to serve, the box may be presumed to have included 300 qualified jurors. More than 2,000 names were those of women who qualified for State jury duty, which prescribes standards at least as strict as does federal jury duty. Compare 28 U.S.C. 1861 with Florida Statutes, § 40.01. Except for physical capacity and residence in the district, the Florida qualifications for voting are the same as federal jury standards. See Florida Statutes, § 97.041. Hence it is most unlikely that the number of qualified jurors in the box fell below the statutory minimum. Cf. *Beatrice Foods Co.* v. *United States*, 312 F. 2d 29, 35–37 (C.A. 8), certiorari denied, 373 U.S. 904. The burden of proving that it did was on petitioner, *United States* v. *Meyer*, 113 F. 2d 387, 395 (C.A. 7) certiorari denied, 311 U.S. 706, and the district court correctly concluded that this burden had not been satisfied.[8]

Nor was the selection invalid because the jury officials drew names for the box by handfuls rather than individually. The statute was intended to assure only that both the commissioner and the clerk participate equally in the selection of a jury, *Hauptman* v. *United States*, 43 F. 2d 86, 89 (C.A. 9), and

[8] In *United States* v. *Silverman*, 129 F. Supp. 496 (D. Conn.), on which petitioner relies (Pet. 14–15), there was a *total* lack of information concerning the persons whose names were put in the box (all names were suggested by sponsors, who were shown to have been given no standard upon which to base their recommendations), and the jury list consisted of only 414 names. Hence a mere 28% disqualification rate (as against 95% here) would have been sufficient for the number of qualified persons to fall below 300.

not that any particular formalistic act be performed by either or both. Cf. *Gaughan* v. *United States*, 19 F. 2d 897, 898 (C.A. 8).

6. Judge Whitehurst's failure to recuse himself raises no substantial issue since recusal was not required by either 28 U.S.C. 47 or 28 U.S.C. 455. The judge was not disqualified by the terms of the former statute since the appeal was clearly not "from the decision of a case or issue tried by him." Nor had he even any occasion to pass on the issue in other cases tried by him in the district court. And since the system was not devised by him or executed under his authority, he had no actual interest in sustaining it. In fact, the orders given to the jury commissioner by the district court with respect to this grand jury were given by District Judge Emmett C. Choate (R. 275). As the court of appeals correctly held, the mere fact that Judge Whitehurst had known of the system in his judicial capacity before the case arose would not be sufficient to warrant his disqualification.

7. Finally, this case presents no issue of major significance since the method used in selecting jurors in the Southern District of Florida has been changed since the case arose. Today jurors are selected from city directories, without reference to their race or sex. Questionnaires are then mailed to each of those selected, and the returns are examined to determine whether those chosen are qualified under 28 U.S.C. 1861. Each qualified prospective juror is then listed on a separate slip of paper, and these are used in

accordance with the procedure described by 28 U.S.C. 1864.

CONCLUSION

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ARCHIBALD COX,
Solicitor General.
HERBERT J. MILLER, JR.,
Assistant Attorney General.
BEATRICE ROSENBERG,
MARSHALL TAMOR GOLDING,
Attorneys.

JULY 1964.

U.S. GOVERNMENT PRINTING OFFICE: 1964

Office-Supreme Court, U.S.
FILED
JUL 27 1964
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1964

No. 151.

ALVIN CHANCE,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITIONER'S REPLY BRIEF.

J. EDWARD WORTON
548 Pan American Bank Building
Miami 32, Florida

JOSEPH P. MANNERS
Industrial National Bank Building
Miami 32, Florida

W. G. WARD
1240 duPont Building
Miami, Florida

CHESTER BEDELL
1520 Barnett National Bank Building
Jacksonville, Florida 32202

Attorneys for Petitioner.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

No. 151.

ALVIN CHANCE,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITIONER'S REPLY BRIEF.

The Government is mistaken in assuming, if it does assume, that

> "Petitioner's basic claim must, therefore, be that jury commissioners are compelled by 28 U. S. C. 1861 to adopt a system which will inevitably produce an actual cross-section of the community."
>
> Brief in Opposition, p. 8.

Because this same misconception inheres in the opinion below (A. 27), we stated in the petition as clearly as we could that:

> "In this case, the complaint is not that the jury officials exercised their discretion badly but that they did not exercise it at all."
>
> Petition, p. 11.

The Government's Brief in Opposition again confronts us with the necessity of stating the issue "in the terms and

circumstances of the case." Rule 23(1)(c). The real issue —the question that the Court below decided in a way in conflict with applicable decisions of this and other courts— is simply whether section 1861 positively and affirmatively requires federal jury officials to exercise their own informed judgment in selecting the names of the requisite number of qualified citizens for inclusion in the jury box.

Petitioner does not contend (as the Government insists he does) that the jury officials purposefully adopted a system that was calculated to or did exclude women or Negroes because of considerations of sex or of color (Brief in Opposition, pp. 7-8). Neither does petitioner insist that jury officials may not rely principally or even exclusively on state voter registration lists when those lists have been found by the federal officials to provide a satisfactory index to the citizenry (Brief in Opposition, p. 7). Nor yet does petitioner contend that "the number of qualified jurors in the box fell below the statutory minimum" (Brief in Opposition, p. 10).

Rather, petitioner contends that the jury officials, ignoring the mandate of the Civil Rights Act of 1957 thereafter to choose prospective federal jurors without reference to state selection standards (71 Stat. 638, Title 28 U. S. C. §1861), continued thoughtlessly to follow a system that eliminates citizens who cannot qualify for state jury service; and that the jury officials, having in this manner collected a number of names, dumped those names by handfuls into the federal jury box without considering for a moment whether those persons were qualified for jury service under independent federal standards created by statute.

This Court declared in *Glasser* v. *United States*, 315 U. S. 60, 85, that:

> "Jurors in a federal court . . . are to be selected by the clerk of the court and a jury commissioner. Secs. 275, 276, Jud. Code, 28 U. S. C. secs. 411, 412, 28 U. S. C. A. ss 411, 412. This duty of selection may not be delegated."
>
> 315 U. S. at 85.

and, in *Ballard* v. *United States*, 329 U. S. 187, that this Court has a duty to "exercise our power of supervision over the administration of justice in the federal courts" when there is demonstrated "a departure from the scheme of jury selection which Congress adopted" (329 U. S. at 193) and "an administrative denial of a right which the lawmakers have not seen fit to withhold from, but have actually guaranteed to [the defendant]" (329 U. S. at 195).

If it is still the law that the clerk and the jury commissioner are "the officials charged with choosing federal jurors" (*Glasser* v. *United States*, 315 U. S. at 86) and that those officials have the mandatory, positive and non-delegable duty to use their informed judgment in deciding the crucial questions

> *Which are the best available local sources from which may be gathered the names of prospective jurors?* and
> *Which among the citizens thus identified possess the statutory qualifications for federal jury service?*,

the writ should be granted, because the court below has held:

> "[T]he law as it now stands places the officials under no mandatory or positive commands; they are, on the contrary, controlled by one negative requirement: they may not discriminate, directly or indirectly."
>
> Opinion of Judge Whitehurst, 322 F. 2d at 205; A. 29.

Under the federal juror selection system, jury officials have a *duty* to discriminate. They have no function other than to discriminate against the unqualified. In recognition of that function, many judges and others interested in the administration of justice have bent their efforts to equip the jury officials to discriminate wisely. See, *e.g.*, *The Jury System in the Federal Courts* (*Report of the*

Judicial Conference Committee on the Operation of the Jury System), 26 F. R. D. 411. The only discriminating act of the jury officials in this case was to enforce a standard disapproved and abolished by Congress in 1957, and thus to eliminate as prospective jurors those unqualified to serve on Florida juries. Their failure to undertake to discriminate between the qualified and unqualified may not be justified on the ground that they at least did not discriminate unfairly—as against women for their sex or Negroes for their color (see the Government's Brief in Opposition, pp. 7-8).

If the jury officials had a nondelegable duty (*Glasser*, 315 U. S. at 85) to decide on a selection process that under local circumstances is suitable to effectuate federal policy, their default in discharging that duty should not be defended by attributing to them plausible but wholly ficticious reasons for undertaking certain conduct, then arguing that the officials had broad discretion and so could properly have decided to do what they did. Thus, these officials did not consult the voter registration lists after selecting those lists as the best index to the larger body of qualified citizens [as obviously was done by the jury officials in such cases as *Gorin* v. *United States* (1st Cir. 1963), 313 F. 2d 641, cited in the Brief in Opposition, p. 7]. Had such a decision been made in this case, presumably the jury officials would have selected the names of women as well as the names of men from the registration lists. But, by systematically excluding women's names in selecting from the registration lists and by limiting their consideration to those female electors who volunteered for state jury service, the jury officials arbitrarily excluded from consideration over ninety-nine per cent of the female electors in the selection area of Dade and Broward Counties.* Moreover, had the officials regarded

* Even if, as the Government speculates (Brief in Opposition, p. 7, n. 6, p. 10), all of the 2167 names of women which were taken from the lists of volunteers were placed in the federal jury box, those names comprised less than one per cent of the female electors (R. 218, 223) and only a fraction of one per cent of the adult females (R. 232-33) in the selection area.

the voter registration lists as providing the best access to a cross-section of the community, the officials would not now be selecting names "from city directories, without reference to their race or sex," as the Government represents they are doing (Brief in Opposition, p. 11). If as a matter of policy the jury officials had decided to lessen the burden on women by calling only those who volunteered for jury service—as was suggested by the Government in the Court of Appeals—they surely would not have required as a prerequisite to federal service that they first volunteer for state jury service (R. 239, 261).

We do not say that the law requires jury officials to use a "*particular* method in selecting jurors" (Brief in Opposition, p. 9; see also Opinion below, 322 F. 2d at 205). Instead, we insist that the officials must themselves select a method, having in mind the federal standards it is their duty to apply.

We have felt that the inattentiveness of the jury officials to their duty is symbolized by their conduct in alternatively dropping handfuls of names into the box (Petition, p. 14), in clear violation of section 1864 of Title 28. In the same way, the Government's argument on this point symbolizes the sort of justification that has been given at every step in this proceeding by United States officials charged with the administration of justice:

> "The statute was intended to assure only that both the commissioner and the clerk participate equally in the selection of a jury . . . and not that any particular formalistic act be performed by either or both."
>
> Brief in Opposition, pp. 10-11.

Since neither the clerk nor the commissioner undertook to select even one prospective juror as qualified under federal standards but left such selection to be "taken care of when they are qualified on voir dire" (R. 294), it is ironically true that the two officials did "participate equally in the selection." But equal disregard of the statutory scheme could hardly have been intended by Congress.

For the reasons stated in the petition, the writ should be issued.

Respectfully submitted,

J. Edward Worton
548 Pan American Bank Building
Miami 32, Florida

Joseph P. Manners
Industrial National Bank Building
Miami 32, Florida

W. G. Ward
1240 duPont Building
Miami, Florida

Chester Bedell
1520 Barnett National Bank Building
Jacksonville, Florida 32202
Attorneys for Petitioner.